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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/074,370	02/12/2002	Don W. Cochran	PSS 2 0073	5725

7590 11/13/2003

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EXAMINER

GIBSON, RANDY W

ART UNIT PAPER NUMBER

2841

DATE MAILED: 11/13/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/074,370	COCHRAN ET AL.	
	Examiner	Art Unit	
	Randy W. Gibson	2841	

-- The MAILING DATE of this communication appears on the cover sheet with the corresponding address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) ☒ Responsive to communication(s) filed on 04 November 2003.

2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.

3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) ☒ Claim(s) 1-48 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) ☐ Claim(s) _____ is/are allowed.

6) ☒ Claim(s) 1-48 is/are rejected.

7) ☐ Claim(s) _____ is/are objected to.

8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) ☐ The specification is objected to by the Examiner.

10) ☒ The drawing(s) filed on 02 February 2002 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) ☐ All b) ☐ Some * c) ☐ None of:

1. ☐ Certified copies of the priority documents have been received.

2. ☐ Certified copies of the priority documents have been received in Application No. _____.

3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

a) ☐ The translation of the foreign language provisional application has been received.

14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)

2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2&3.

4) ☐ Interview Summary (PTO-413) Paper No(s). _____.

5) ☐ Notice of Informal Patent Application (PTO-152)

6) ☐ Other: _____.

DETAILED ACTION

Information Disclosure Statement

1. With regard to the IDS filed February 12, 2002, the applicant has stated:

"[t]he Examiner also notes that a letter, which is dated, indicates that patented technology is used by AgrTopWave. The Examiner stated that the applicants are "required" to supply the USPTO with any patents that cover the patented technology referred to in the letter. The applicants are unclear as to the precise meaning of this requirement" as announced by the Examiner" [emphasis added].

In response to this plea of ignorance, the examiner quotes from the declaration that the applicant himself signed and submitted with his original papers:

"I acknowledge the duty to disclose information which is material to the patentability of this application in accordance with Title 37, Code of Federal Regulations, §1.56."

Since the applicant has at least a common-law duty to read what he signs, he cannot say that " [t]he applicants are unclear as to the precise meaning of this requirement" as announced by the Examiner" -- since applicant signed this declaration which plainly stated that he was well aware of his duty to disclose any information that is "material" to the patentability of this application. With this requirement in mind, the examiner turns to

the next statement by the applicant in which the applicant seems to state that he has the right not to give certain information to the PTO that the examiner believed would be material to determining whether a rejection under 35 USC 102 (a), (e), (f) or (g) was in order:

"In addition, there is no requirement that an explanation of relevance be provided or that any relationship of the company that apparently produced these documents may have to the inventors be provided."

If the company that produced these documents was an assignee or employer of the inventors, then obviously this changes the section of the law which might apply since 102(a) expressly does not apply unless there is evidence that the invention was known or used by "others" ; likewise 102(e) requires that a publication be published by "another" before it can be considered prior art. Without telling the patent office what relationship the company who published these documents has to the inventors, the PTO has no way of determining if these documents represent prior art or not -- especially since most of the documents are UNDATED. Therefore these documents are useless in determining what the state of the art was at the time the invention was made or in determining the level of skill of the ordinary practioner as required by section 103 of the statute.

The applicant's statement that " the documents were submitted as a group to help place them in a context" is inaccurate since any meaningful "context" has to include at least: (i) dates (to determine if the document was publicly known "prior" to the

date of the invention as the statute plainly states); and, (ii) the author's relationship to the inventors (so that a determination can be made as to whether these documents represent knowledge known by "others" as the statute plainly requires or just knowledge known by employees of the assignee). It seems that the applicant is deliberately withholding the two most vital pieces of information that would allow the PTO to determine if any of these documents were relevant to the issue of patentability. Note also that 37 CFR § 1.98 (b)(5) expressly required that each document cited on an IDS, among other things, be DATED -- a requirement that the applicant has refused to meet. This examiner reminds the applicant that he has a sworn duty to disclose information which is material to the patentability of this application in accordance with Title 37, Code of Federal Regulations, §1.56.

2. Incidentally, the information disclosure statement filed February 12, 2002 still fails to comply with 37 CFR 1.98(a)(1), which requires a list of all patents, publications, or other information submitted for consideration by the Office. A "list" requires that each individual document be separately named on the PTO-1449; a single vague statement regarding "various brochures and other material" does not meet this requirement. The IDS has been placed in the application file, but the information referred to therein has not been considered.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1-48 are rejected under 35 U.S.C. 102(b) based upon a public use or sale of the invention as evidenced by the "letter to customers" signed by David Dineff, Product Marketing Director of AGR TopWav, Inc., on November 15, 2000. Since applicant will not disclose who AGR TopWav is, the PTO has to assume that this is the assignee of the present invention, and that the infrared and ultrasonic "inspection systems" referred to therein are the applicant's disclosed invention since the applicant has not met his duty to "disclose" exactly what is being offered for sale by this letter as required by 37 CFR § 1.56.

5. Claims 1, 2, 4-15, and 39-48 are rejected under 35 U.S.C. 102(a) as being anticipated by Plastic Technologies, Inc. (WO 01/65204 A1). By measuring the thickness of the wall at multiple points, the apparatus is inherently measuring the "volume of the selected region" as applicant has defined the term "volume" (the width is apparently 1 unit defined by the width of the beam; see p. 18).

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 3 and 16-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Plastic Technologies, Inc. (WO 01/65204 A1) in view of Fumoto (U.S. # 4,510,389). Plastic Technologies, Inc. discloses the claimed invention except for the optical bandpass filter integrated into the optical path of the sensor. However, Fumoto teaches that it is known to use an optical bandpass filter into the optical path of an infrared sensor in a thickness gage such as the one disclosed by Plastic Technologies, Inc. motivated by the desire to increase accuracy by filtering out ambient light. The examiner noted in the last office action that use of variable apertures, spatial light modulators, and lenses are well known from the camera art and would have been obvious to the ordinary practitioner motivated by the desire to increase accuracy.

The examiner took official notice in the last office action that solid state LEDS are common light source and their use would have been an obvious and known functional equivalent to the disclosed IR light bulb and would have been obvious to the ordinary practitioner to substitute one for the other motivated by their art recognized suitability for their intended use. See *Ryco, Inc. v. Ag-Bag Corp.*, 857 F.2d 1418, 8 USPQ2d 1323 (Fed. Cir. 1988); and *MPEP* §§ 2144.06 & 2144.07.

The examiner also took official notice in the last office action that the technique of pulsing the infrared light source, instead of using a chopper wheel, to create a varying light source is an obvious and known functional equivalent and would have been obvious to the ordinary practitioner to substitute one for the other motivated by their art recognized suitability for their intended use. See *In re Ahlert*, 424 F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970); and, *MPEP* § 2144.03.

Conclusion

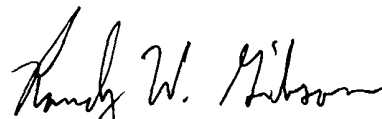
8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See *MPEP* § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Randy W. Gibson whose telephone number is (703) 308-1765. The examiner can normally be reached on Mon-Fri., 9-5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David S Martin can be reached on (703) 308-3121. The fax phone number for the organization where this application or proceeding is assigned is (703) 308-7722.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-5115.


Randy W. Gibson
Primary Examiner
Art Unit 2841